ULTRA DIMENSION SDN BHD

v.

SEPADAN TUAH SDN BHD; GENESIS THE AS AGENCY SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-285-98]
4 MAY 2000

CIVIL PROCEDURE: *Amendment - Application for - Whether bona fide application by plaintiff - Whether application sought to correct mistake by solicitor - Whether amendment would alter nature of plaintiff's claim - Whether defendant would be prejudiced - Whether third party proceedings an obstacle to application*

This was the defendant's appeal against the decision of the Senior Assistant Registrar ('SAR') who allowed the plaintiff's application for leave to amend its statement of claim. The plaintiff's said application sought to amend para. 3 of its statement of claim by substituting a code number "UDO281" with that of UDO271" within the ambit and purport of O. 20 r. 5(1) of the Rules of the High Court 1980 ('RHC').

The issues for determination were: (i) whether the application for amendment was a *bona fide* application; (ii) whether the said application was sought to correct a mistake made by the solicitor; and (iii) whether the third party proceeding herein was an obstacle to the said application.

Held:

[1] The proposed amendment arose as a consequence of a typographical error in regard to the code number of the photograph bearing in mind that both code numbers "UDO281" and "UDO271" relate to the same subject matter. It was a pure and simple *bona fide* mistake on the part of the plaintiff. It was not an attempt by the plaintiff to change the character of this suit to that of another.

[2] The mistake could not be attributed to the solicitor having conduct of the case. It was a pure, simple typographical error which was only realised at the interrogatory stage and before the trial got off the ground. At any rate, even if the solicitor was at fault the plaintiff should not be punished for the mistake of the solicitor. The correct remedy would be to allow the proposed amendment because it would not cause prejudice to the defendant.

[2a] If the defendant was of the view that its defence would be affected by the plaintiff's proposed amendment, the defendant was at liberty to amend its defence with costs to be incurred by the plaintiff. The Rules of the High Court 1980 did not prevent the defendant from amending its defence in the event the plaintiff's proposed amendment was accepted by this court.

[3] The proposed amendment did not alter the basis or nature of the plaintiff's claim at all. It was an amendment designed to assist the court in adjudicating the case during the trial proper. There was no prejudice incurred by the defendant as a result of the minor amendment to the statement of claim.

[4] The third party proceeding could not constitute an obstacle towards the plaintiff's application to amend its statement of claim because the third party proceeding was in fact and in law a distinct and separate matter that arose between the defendant and the third party and consequently it did not concern the plaintiff at all. The plaintiff's claim was entirely crafted and designed solely against the defendant and not the third party.

[5] The application to amend the statement of claim fulfilled all the legal requirements and it should be allowed. The SAR was correct when she allowed the plaintiff's application for leave to amend its statement of claim.

[Appeal dismissed.]

Case(s) referred to:
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(refd)***
Attorney-General v. West Ham Corporation [1910] 74 JP 196 ***(refd)***
Clarapede v. Commercial Union Association [1883] 32 WR 263 ***(refd)***
Cropper v. Smith [1983] 26 Ch D 700 ***(refd)***
GL Baker, Ltd v. Medway Building & Supplies, Ltd [1958] 1 WLR 1216 ***(refd)***
Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] 1 AC 189 ***(refd)***
Kurtz v. Spence 36 Ch D 774 ***(refd)***
Mahan Singh v. Government of Malaysia [1973] 2 MLJ 149 ***(refd)***
Malayan Banking Ltd v. Ting Ee Ngieng & Anor [1965] 2 MLJ 160 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 ***(refd)***
Palaniappan Kotayan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 ***(refd)***
Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 ***(refd)***
The Duke of Buccleuch [1892] P 201 ***(refd)***
The Alert 72 LT 124 ***(refd)***
Tildesley v. Harper 10 Ch D 396 ***(refd)***
Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5(1)

Other source(s) referred to:
Supreme Court Practice, 1995, vol 1, Part 1, p 374

For the plaintiff - Jonathan Law Wei Keat; M/s Liow & Co
For the defendant - Abd Shukor Ahmad (Baljit Singh Sidhu with him); M/s Shukor Baljit & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal lodged by the defendant to the judge in chambers in encl. 32 against the decision of the senior assistant registrar ("SAR") that was handed down on 28 September 1999 in allowing the plaintiff's application for leave to amend its statement of claim as seen in encl. 25. The plaintiff's application for leave to amend the statement of claim in encl. 25 merely sought to amend para. 3 of its statement of claim by substituting the code number "UDO281" with that of "UDO271" within the ambit and purport of O. 20 r. 5(1) of the Rules of the High Court 1980 ("RHC") which states as follows:

> Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Jenkins LJ in *GL Baker, Ltd v. Medway Building & Supplies, Ltd* [1958] 1 WLR 1216 at p. 1231 aptly said that all amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings." Bramwell LJ in *Tildesley v. Harper* 10 Ch D 396, 397 succinctly said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

Brett MR in *Clarapede v. Commercial Union Association* [1883] 32 WR 263 even ventured to say that:

> However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be

made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

Then there is a principle of law which says that an amendment ought to be allowed so that "the real substantial question can be raised between the parties" (*Kurtz v. Spence* 36 Ch D 774; *The Alert* 72 LT 124). Amendments have been generously allowed by the courts over the years. The phrase "at any stage of the proceedings" that appears in O. 20 r. 5(1) of the RHC connotes a wide meaning. Amendments can therefore be made and may be allowed before, or at, or after the trial, or even after judgment or on appeal (*The Duke of Buccleuch* [1892] P 201, and *GL Baker, Ltd v. Medway Building & Supplies, Ltd* [1958] 1 WLR 1216, CA).

Now, reverting back to the mainstream of the case, the defendant vehemently opposed the plaintiff's application. The relevant affidavits that were referred to in the course of the arguments were quite plain and straightforward. Enclosure 25 was supported by an affidavit affirmed by Bok Tai Siew on 7 June 1999 as seen in encl. 24. In response, Nurulaini bt Hj Ali ("Nurulaini") affirmed an affidavit in reply on 5 July 1999 as seen in encl. 26. Bok Tai Siew responded and affirmed an affidavit in reply on 19 July 1999 as seen in encl. 27. Nurulaini in turn affirmed an affidavit in reply on 13 August 1999 as seen in encl. 29 by way of a response. Finally, Bok Tai Siew affirmed a last affidavit in reply on 3 September 1999 as reflected in encl. 30. Without a doubt, these affidavits would be referred to in the course of adjudicating encl. 32.

The core of the plaintiff's arguments as seen in the supporting affidavits may be summarised as follows. The plaintiff said that the proposed amendment was indeed necessary as it would identify the exact photograph, the copyright of which was said to belong to the plaintiff. That copyright, according to the plaintiff, had been infringed and the amendment was thus necessary to complete the statement of claim.

The defendant, on the other end of the scale, resisted the application and questioned the propriety of the application. Briefly put, the defendant raised three major issues that needed to be examined and deciphered. The issues were in regard to:

(1) the *bona fide* of the application;

(2) and the mistake said to be done by the solicitor; and

(3) finally, the question of the involvement of a third party.

Bona fide Of The Application

The plaintiff's course of action against the defendant as seen from the statement of claim centred on the purported infringement of a copyright. This was a cause of action which the defendant vehemently and categorically denied in its statement of defence. The purported infringement pertained to a photograph that was compiled in a collection of photographs entitled:

MALAYSIA

PHOTO RESOURCES

COLLECTION

ULTRA DIMENSION PHOTO CATALOG 1

A SELECTIVE RESOURCE OF TALENT

and exhibited as an exhibit marked as "NAA 1" of the affidavit in reply of Nurulaini as seen in encl. 29. It was indeed interesting to view the collection of photographs and of significance to note would be the similarities between the photographs bearing the code number "UDO281" with that of "UDO271". The photograph of "UDO271" was taken at a distance while the photograph "UDO281" was a close up view of the same subject matter. These two photographs showed two children, in happy mood, gliding down the slide. The plaintiff in launching its claim against the defendant asserted that the infringement of code number "UDO281" was specific and real. But, so submitted the defendant, the assertion by the plaintiff proved to be unfounded when the plaintiff sought leave to amend the statement of claim in encl. 25.

An argument was advanced that, on 3 September 1998, the plaintiff by way of an application in encl. 13 sought to force admission on the part of the defendant by way of a summons for interrogatories. The SAR heard encl. 13 and ruled in favour of the plaintiff thereby giving leave to the plaintiff to issue interrogatories on the defendant. The summons for interrogatories referred to an infringement of a copyright of photograph bearing code number "UDO281" and it was served on the defendant. The defendant wasted no time and by an affidavit opposing the application of the plaintiff in encl. 13, Nurulaini affirmed an opposing affidavit on 30 September 1998 as seen in encl. 14 and there she denied any infringement of the copyright of that photograph. The plaintiff only realised the mistake as to the code number when the defendant through Nurulaini filed the opposing affidavit in encl. 14. This prompted the plaintiff to file the application for leave to amend its statement of claim as seen in encl. 25.

An argument was advanced for the plaintiff to the effect that the plaintiff's application to amend its statement of claim in encl. 25 was *bona fide* in nature and the following reasons were advanced:

(a) It was said that the purpose of the amendment in encl. 25 was merely to identify, in its correct perspective, the particular photograph in issue which was "UDO271" instead of "UDO281".

(b) The plaintiff was not springing a surprise nor caught the defendant off guard as the plaintiff had clearly pleaded in para. 4 of the statement of claim that the particular photograph which was the subject matter of dispute was the one that specifically appeared in an advertisement in the "Berita Harian" newspaper dated December 11, 1997. The defendant, so it was said, knew all along and had full knowledge of the particular photograph in issue.

(c) The amendment was said to be essential because it would bring into sharp focus the photograph that bore the code number "UDO271". The amendment too would bring paragraph 3 and paragraph 4 of the Statement of Claim into harmony with one another because the particular photograph which appeared in the "Berita Harian" newspaper on December 11, 1997 was indeed the one that bore the code number "UDO271" and not "UDO281" or any other number, for that matter.

(d) At the trial proper, the plaintiff would have to discharge its burden by showing that the particular photograph in issue was the very same one that bore the code number "UDO271" and not "UDO281" or any other photograph. It was the stand adopted by the plaintiff that the amendment was crucial and that it was not made by way of a fishing expedition.

(e) It was said that the defendant's reply to the interrogatories as seen in enclosure 23 merely adverted to general denial of using any of the plaintiff's photographs. That denial was not limited to nor focussed solely to the photograph bearing code number "UDO281."

(f) It follows therefore, so the submission went, that the proposed amendment envisaged in enclosure 25 would not bring any adverse effect upon the defendant's case because the defendant's denial was too general in its scope and effect. At paragraph 1 of enclosure 23, Nurulaini deposed in plain simple language as follows:

> 1. Bagi menjawab soalan bernombor satu (1) interrogatori plaintif, saya mengatakan bahawa adalah tidak benar kami telah menggunakan **gambar-gambar** foto (termasuk gambar foto kod nombor UDO281) untuk suatu iklan di dalam Berita Harian bertarikh 11.12.97 dan kami tidak mempunyai apa-apa pengetahuan mengenai hakmilikcipta plaintif ke atas gambar-gambar foto tersebut. Oleh itu tiada sebarang kebenaran daripada plaintif adalah diperlukan.

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> It would appear therefore that the defendant made general denials. It was a denial of using the plaintiff's photographs including the photograph bearing code number "UDO281". The denial was not limited nor confined solely to the photograph with the code number "UDO281" but rather to all the photographs. The words employed were "gambar-gambar foto" – referring to the photographs and not to one photograph in particular.

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(g) All these, according to the plaintiff, showed that the proposed amendment was not for the sake of tailoring the plaintiff's case to suit the facts that cropped up as a result of the defendant's denial in its reply to the plaintiff's interrogatories.

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(h) The mistake was, according to the plaintiff, a genuine one as a result of typographical error.

Malek Ahmad JCA (now FCJ) in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361, speaking for the Court of Appeal cited

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p. 374 of the *Supreme Court Practice*, 1995, volume 1, as it was of relevance and this can be seen at p. 372 to p. 373 of the report:

> There will be difficulty, however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading by introducing for the first time allegations of fraud, or

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> misrepresentation or other such serious allegations, the Court will ask why this new case was not presented originally; and may require to be satisfied as to the truth and substantially of the proposed amendment (*Lawrence v. Norreys* [1890] 39 Ch.D. 213; see judgment of Stirling J page 221, and of Bowen LJ page 235).

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and flowing from this passage, it may be asked whether the proposed amendment as envisaged in encl. 25 by substituting the code number "UDO281" with that of "UDO271" would introduce for the first time fresh allegations like fraud or misrepresentation or for that matter some other serious allegations. The answer would clearly be in the negative. Indeed the proposed

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amendment did not introduce serious allegations that would warrant this court to sit back and ask itself why it was not presented originally – to borrow the phrase from the *Supreme Court Practice* 1995, vol 1, part 1 at p. 374 thereof. In my judgment, the proposed amendment arose as a consequence of a typographical error in regard to the code number of the photograph bearing

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in mind that both code numbers "UDO281" and "UDO271" relate to the same subject matter as alluded to in the early part of this judgment. It was pure and simple a *bona fide* mistake on the part of the plaintiff and nothing else. It was not an attempt by the plaintiff to change the character of this suit to that of another. This was my judgment and I so hold accordingly.

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Mc Gilligan J had occasion to consider an application to amend the statement of claim in the case of *Malayan Banking Ltd v. Ting Ee Ngieng & Anor* [1965] 2 MLJ 160. In that case the plaintiffs there applied to amend their statement of claim. In the original statement of claim the plaintiffs had alleged that the second defendant had stood as guarantor for the first defendant and the plaintiffs sought to substitute this by stating that the second defendant had stood as guarantor by a letter of guarantee in writing. In allowing the application for amendment his Lordship said that it was made *bona fide*, and the amendment would not turn the suit into one of a different and inconsistent nature and finally it would not cause injustice or prejudice to the other party. This was what his Lordship Mc Gilligan J said at p. 161 of the report:

> In *Mallal's 'Supreme Court Practice'* at page 342 the general principle is stated to be that the court will allow such amendments as will cause no injustice to the other side. It is also said, quoting from the case of *Looi Guan Kway v. Low Lean Bok* [1938] MLJ 35 that to determine whether injustice would or would not result a court will ask the following three questions:
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> (1) Is the application for amendment made *bona fide*?;
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> (2) Will the amendments asked for cause no prejudice to the other side which cannot be compensated by costs?;
>
> (3) Are the amendments asked for such as to turn a suit of one character into a suit of another and inconsistent character?
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> I am satisfied that these are the questions a court should ask itself in such an application as this for amendment of pleadings, and I believe it fair to say that both advocates agree.

Other judges followed suit and dutifully followed the judgment of McGilligan J in *Malayan Banking Ltd v. Ting Ee Ngieng & Anor (supra)*. Mohamed Azmi FCJ (as he then was) in *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, 214, 215 in the same vein said this:

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

Visu Sinnadurai J in *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 MLJ 353 after vigorously applying the decision of Mohamed Azmi FCJ (as he then was) in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors (supra)* had this to say at p. 364 of the report:

> It should, however, be stressed that the proper test which the courts apply, is not whether in allowing the amendment, it would cause injustice to the other party, but whether in the circumstances of the case, it is just to grant leave. In considering whether it is just to grant leave, the courts must necessarily consider the interests of both parties: whether injustice would be caused to the applicant if leave is not allowed, and whether injustice would be caused to the defendant if leave is granted. Therefore, in exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment.

The headnote to the case of *Palaniappan v. Universiti Pertanian Malaysia (supra)* at p. 353 reads as follows:

> The courts have a wide discretion whether or not to allow an amendment. The proper test to apply is not whether the amendment would cause injustice to the other party, but whether in the circumstances of the case, it was just to grant leave. In exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment. Generally, the courts readily grant leave to amend before trial, so long as the application is made in good faith and within a reasonable time and so long as the injustice caused to the opponent can be compensated by costs.

Even Malek Ahmad JCA (now FCJ) in adjudicating the case of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors (supra)* cited the decision of Mohamed Azmi FCJ (as he then was) in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors (supra)* especially the very passage that had been reproduced earlier.

The Court of Appeal in *Taisho Co. Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359 heard an appeal in regard to the decision of the High Court judge who refused to allow the application to amend the statement of claim under O. 20 r. 5 of the RHC. In dismissing the appeal, the Court of Appeal had this to say (see the headnote):

> A plaintiff seeking an order under O. 20 r. 5 of the RHC must satisfy two requirements in O. 20 r. 5(2) and (5): (i) that the facts of the case remain the same or substantially the same; and (ii) that it would be just to grant leave to amend. If he fails one, he fails altogether. In the present case, the appellant had satisfied condition (i) but had failed to satisfy condition (ii). Further, the question of whether this application was *bona fide* also had to be considered. No reasons were given for the delay in filing this application and the application bordered on lack of *bona fides*. The High Court judge had correctly

considered the two requirements under O. 20 r. 5(2) and (5) and had exercised his discretion judicially. There were no good grounds for this court to interfere.

but the factual matrix of the present appeal in encl. 32 not only showed that the facts in the proposed amendment with that of the original statement of claim remained the same or substantially the same, it also showed that it was just to grant leave to amend. The amendment was indeed very minor. It was to substitute the code number "UDO281" with that of "UDO271" and, in the circumstances, it would be just to grant leave to amend.

I pause here to take stock of the situation. The amendment which the plaintiff sought was clearly an amendment before the trial of the civil suit. It was an amendment made before the parties had their day in open court. It should therefore be readily granted on payment of the necessary costs because it flowed out of the same facts and such costs to be awarded provided there was prejudice sustained by the defendant. To me, the amendment by substituting the code number "UDO281" with that of "UDO271" was "so germane to, and so connected with, the original cause of action, that it would be a denial of justice" if leave to amend was refused (*Attorney-General v. West Ham Corporation* [1910] 74 JP 196, CA). At this juncture, I need to refer to the speech of Malek Ahmad JCA (now FCJ) in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors (supra)* where his Lordship at p. 373 to p. 374 of the report quoted with approval the decision of the House of Lords in *Ketteman and Others v. Hansel Properties Ltd and Others* [1987] 1 AC 189 which was as follows:

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a Judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a Judge must weigh in the balance is the pressure on the Courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by

> allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

And his Lordship then said at p. 374 of the report:

> The authorities strongly indicate that the Courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

Mistake By Solicitor

An argument was advanced by the defendant to the effect that the mistake was fatal and, consequently, the amendment ought not to be allowed. It was submitted that the proposed amendment by the plaintiff was purely to change the character of the suit after its maiden attempt together with the interrogations at forcing the confession out of the defendant miserably failed. By way of an answer, reference to the case of *Palaniappan Kotayan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693, which was earlier referred to in this judgment should be referred to. At p. 701 of the CLJ reporting, Visu Sinnadurai J (as he then was) said:

> Leave is generally granted if the applicant's original claim is bound to fail, thereby leaving the applicant with no redress. This is especially so, if the applicant is the plaintiff in the action. Again to quote Jacob and Goldrein, at p. 202:
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> > … the object of these powers (to allow amendments after the expiry of the limitation period) is to prevent certain defects in the writ or pleading from being fatal and to enable the Court to cure the specified defects in an action. ….

To me the mistake cannot be attributed to the solicitor having conduct of the case. It was, pure and simple, a typographical error which was only realised at the interrogatory stage and before the trial got off the ground. At any rate, even if the solicitor was at fault, the plaintiff should not be punished for the mistake of the solicitor. The plaintiff would greatly be prejudiced if leave was not allowed. The following scenario would occur if the proposed amendment was refused: the plaintiff would have to withdraw the civil suit and re-file at the earliest opportunity in order to incorporate the correct code number despite the fact that the facts were substantially the same. On the other hand, the defendant too would have to re-initiate the third party proceedings and all these processes would be time consuming and costs incurring for both parties. In

the circumstances, the correct remedy would be to allow the mistake of the solicitor, if at all it existed, to be corrected by allowing the proposed amendment because it would not cause prejudice to the defendant. Visu Sinnadurai J (as he then was) applied the cases of *Cropper v. Smith* [1983] 26 Ch D 700 and *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149 in adjudicating *Palaniappan Kotayan v. Universiti Pertanian Malaysia (supra)*. At p. 705 of the CLJ reporting, this was what he said:

> After all, as Bower LJ said in *Cropper v. Smith* [1983] 26 CH D 700, at pp 710, at pp 710-711, referred to in *The Supreme Court Practice* 1995, paragraph 20/5 – 8/6, at p. 371:
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> > It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the course of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.
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> In a similar vein, Sharma J in *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149, a case dealing with the dismissal of a public servant, in allowing an application by the plaintiff to amend the statement of claim during the course of the trial observed:
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> > The argument that the plaintiff may be in a position to succeed if the new amendment is allowed is frail and feeble. The courts exist for the administration of justice and to redress wrongs and do not become mere instruments of procedure at the instance of one party to obstruct the path leading to justice or means to redress of a wrong. The procedure of the court, in fact, is designed to facilitate justice and to keep the machinery thereof in smooth running.
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> His Lordship then added:
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> > If the amendment is permissible at this stage, it is irrelevant that the Government [the defendant] may not be able to find a defence to the new pleading. All I have to consider is whether this plea should be allowed to be taken at this stage or not. I do not think that the proposed amendment is dishonest.

Reverting back to the issue of prejudice, and if prejudice really exist (which was not the case here), it can certainly be compensated by costs. I am constrained to say that on the strength of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors (supra)*, the defendant would certainly not be placed in a worse position than they would have been if the amended pleading had been served in the first instance without any objection by the defendant at all. In my judgment, there was no room for prejudice and the defendant too would not be injured, so to speak, by the proposed amendment for the following reasons:

(1) The plaintiff was merely reconciling, in the course of the proposed amendment, para. 3 with that of para. 4 of the statement of claim. It was a very minor amendment that would hardly cause a stir in the teacup, so to speak. The proposed amendment too would not add new facts nor raise serious allegations.

(2) The defendant had full knowledge of the particular photograph in issue bearing in mind that that photograph appeared in the "Berita Harian" newspaper dated 11 December 1997.

(3) The defendant in its defence had denied generally that they had used the plaintiff's photographs and had put the plaintiff to strict proof thereof. Ultimately, the plaintiff has to prove, at the trial proper, that the plaintiff is the copyright owner of the particular photograph in issue, be it "UDO281" or "UDO271".

(4) The bundle of documents have yet to be filed and for this reason the defendant cannot be said to be misled as to the relevant photograph.

(5) The trial has yet to begin and the witnesses have not been called to the stand to testify. There was thus no damage done to the defendant's case at all.

Alternatively, even if there was some injury sustained (which was not the case here) that kind of injury can readily be compensated by costs. In the event, the defendant is of the view that their defence would be affected by the plaintiff's proposed amendment, the defendant is certainly at liberty to amend its defence with costs to be incurred by the plaintiff. The RHC do not prevent the defendant from amending its defence in the event the plaintiff's proposed amendment was accepted by this court.

Involvement Of A Third Party

It is interesting to note that the defendant had hitherto been keeping quiet in regard to this issue. All the affidavits affirmed for the defendant in regard to

the plaintiff's proposed amendment did not address this issue despite the fact that the plaintiff had stressed this issue in para. 7 of encl. 27. The defendant had failed to indicate what was the prejudice they would suffer if the amendment was allowed. In the course of their written submission, the defendant explained how the prejudice would occur by linking it up with the issue of a third party proceeding. The plaintiff was most unhappy with the approach adopted by the defendant in introducing the issue of a third party proceeding by way of a written submission instead of by way of an affidavit evidence. The basis of the plaintiff's submission rested in the decision of Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 at 615, where his Lordship in fine language laid down the law in these words:

> I have carefully perused the affidavit filed by the respondent in support of its summons for judgment (which is the only affidavit delivered by it) but have been unable to discover any such explanation as that alluded to by the learned Judicial Commissioner. The only reference to the delay point is to be found in the address of Counsel for the respondent in the Court below and the explanation is in reality that of Counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence upon the Bar, as was done in this case, is to be deprecated.

The plaintiff drew the attention of the court to the fact that the defendant did not even raise the third party issue when the plaintiff's application to amend the statement of claim first came up before the SAR for hearing on September 27, 1999. Before me, so the submission went, the defendant had, for the very first time, submitted on the issue of a third party proceeding and it was said that that kind of submission was tantamount to adducing fresh evidence. My attention was drawn to the case of *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601 where at p. 620 to p. 621, I said the following, which must surely apply to the facts of the present appeal:

> In a supplementary written submission, the learned counsel for the defendants introduced fresh evidence in the form of two Orders of the courts dated 17 September 1959 and 29 February 1992 respectively. It was urged upon me to accept the fresh evidence in the interest of justice. The short answer would be that the reception of such evidence must be by way of an affidavit and alternatively there was nothing on record to show that these two Orders of the courts were not available before the SAR or for that matter reasonable diligence would not have made it available. Neither was there evidence that this fresh evidence would have had or would have been likely to have had a determining influence upon the decision of the SAR (see O. 56 r. 1(3A) of the RHC). It was not explained as to the delay of the defendants in obtaining the fresh evidence save that this court was urged to take cognisance of the two court Orders. On the issue of fresh evidence, two reported decisions in the country should be cited. The first would be *Chai Yen v. Bank of America National*

Trust and Savings Association [1980] 2 MLJ 142 where the then Federal Court refused an application for the introduction of fresh evidence on the grounds that the applicant had not shown that the evidence could not have been obtained with reasonable diligence for use at the trial and the document in question had no relevance. The second is the case of *Jagindar Singh & Anor v. Tara Rajaratnam* [1988] 2 MLJ 607 where the plaintiff sought to set aside or vary the judgment of a previous action heard *inter partes*, on the ground of discovery of new evidence. The court held that the present writ amounted to re-opening of the case by way of introducing fresh evidence where the issues had been laid to rest by the Privy Council.

It is a principle of law now well cyrstallized that where a party had called no evidence in the court below, the appellate court would not allow him to adduce fresh evidence. The court in *Lim Hee Chuan v. Toh Phaik Har* [1949] MLJ 92 laid down a general principle to the effect that the courts are reluctant to give any litigant a second chance to adduce at a later stage evidence that was in the litigant's possession in the lower court. For these reasons, I refused to allow the reception of that fresh evidence.

Confidently, the plaintiff submitted that the third party evidence should not be considered by me in adjudicating encl. 32 because the third party order was granted on 23 September 1998 way before the plaintiff applied for the amendment on 14 June 1999, yet the defendant saw it fit not to adduce the evidence in any of their affidavits in response to the application in encl. 25. Proceeding cautiously, the plaintiff submitted by way of an alternative that in the event this court were to allow the defendant to adduce the third party issue, the plaintiff would still submit that the defendant would not be prejudiced by the amendment. In my judgment, this kind of prejudice, if at all it existed (which was not the case here), could easily be compensated by costs. Two major reasons may be advanced. Firstly, the proposed amendment by the plaintiff did not alter the plaintiff's original claim. Secondly, the basis of the defendant's claim against the third party did not rest specifically on the photograph that bore the code number "UDO281".

In regard to the first reason, it must be recalled that the basis of the plaintiff's action against the defendant as set out in para. 4 of the statement of claim was in regard to the infringement of the plaintiff's copyright over a particular photograph which appeared in the "Berita Harian" newspaper dated 11 December 1997. But the plaintiff was not amending this. What the plaintiff was interested in amending would simply be in relation to the code number of a photograph stated in para. 3 of the statement of claim and which was mistakenly typed as "UDO281". The foundation of the plaintiff's case did not rest upon the code number "UDO281" but rather upon the particular photograph that specifically appeared in the "Berita Harian" newspaper on 11 December 1997. This was the subject matter of the plaintiff's case and it relates to code number "UDO271". The code number was merely a number

assigned by the plaintiff to all its photographs in the catalogue entitled "Malaysia Photo Resources Collection" for easy identification purposes. For these reasons, it was my judgment that the proposed amendment did not alter the basis or nature of the plaintiff's claim at all. It was an amendment designed to assist the court in adjudicating the case during the trial proper. In my judgment, there was no prejudice incurred by the defendant as a result of the minor amendment to the statement of claim.

In regard to the second reason, the third party proceeding was entirely based upon the quotations and letters exhibited as exh. "NAA-3" of encl. 5 – particularly at para. 6 thereof, an affidavit of Nurulaini. There was nothing in exh. "NAA-3" which indicated that the code number of the photograph was in fact "UDO281". That being the case, the amendment to the code number of the photograph to be "UDO271" would certainly not affect the third party proceeding. The third party proceeding did not rest nor revolve upon the code number but rather it focussed itself upon the transaction that took place between the defendant and the third party. A submission was advanced that the basis of the third party proceeding rested on the plaintiff's Statement of Claim but it must be noted that the third party proceeding was not based upon the code number "UDO281" but rather it was based upon the overall factual matrix of the plaintiff's claim as seen in the statement of claim. The third party proceeding cannot constitute an obstacle towards the plaintiff's application to amend its statement of claim as envisaged in encl. 25 because in my judgment the third party proceeding was in fact and in law a distinct and a separate matter that arose between the defendant and the third party and, consequently, it did not concern the plaintiff at all. The plaintiff's claim was entirely crafted and designed solely against the defendant and not the third party.

Conclusion

On the law, the application to amend the statement of claim fulfilled all the legal requirements and it should be allowed. The SAR was indeed correct when she allowed the plaintiff's application for leave to amend its statement of claim as envisaged in encl. 25. As demonstrated, the amendment that was sought was so minute and harmless – just to amend the code number in the statement of claim; yet the defendant saw it fit to challenge it with all its vigour and vitality. It was certainly a waste of judicial time. For the reasons adumbrated above, I dismissed the defendant's appeal in encl. 32 with costs.

Since I have ruled that there was no prejudice at all being incurred by the defendant as a result of the minor amendment to the statement of claim, there was no need to grant costs to the defendant. I made that order accordingly.